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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE THIRD INSTALMENT OF INDIVIDUAL CLAIMS FOR DAMAGES ABOVE US$100,000 (CATEGORY "D" CLAIMS)

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Introduction

1. This is the fifth report to the Governing Council of the United Nations Compensation Commission (the "Commission") submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure (the "Rules"), by the Panel of Commissioners (the "Panel") appointed to review individual claims for damages above US$100,000 (category "D" claims). [1] This report contains the determinations of the Panel in respect of the third instalment, comprising 440 category "D" claims, submitted to the Panel by the Executive Secretary of the Commission, pursuant to article 32 of the Rules.

2. The Panel began its review of the third instalment in July 1998 when it issued the related procedural order. The third instalment is made up of claims which contain loss types for which methodologies were developed during the consideration of claims in the first and second instalments, ("application claims"). [2] In addition to regular communications, the Panel met with the secretariat at the Commission's headquarters in Geneva to consider claims in the third instalment on the following dates: 27-29 July 1998, 16-18 November 1998, 21-22 December 1998 and 25-27 January 1999.

3. At each meeting held to consider claims in the third instalment, the Panel reviewed a number of claims with new issues that had not arisen in previous instalments. The Panel also examined the application of the methodologies already developed and satisfied itself that the appropriate methodologies had been applied to each loss claimed.

I. BACKGROUND

A. Background information

4. The factual background relating to Iraq's invasion and occupation of Kuwait that was taken into account by the Panel in reviewing claims in this third instalment, is set out in detail in the First and Second Reports [3].

5. The Panel has also taken into consideration additional relevant material, including information accompanying the submission of the third instalment of claims provided by the Executive Secretary pursuant to article 32 of the Rules and additional information and views presented by Governments that have submitted claims, and by the Government of Iraq, in response to the reports submitted to the Governing Council by the Executive Secretary in accordance with article 16 of the Rules.

B. General legal framework

6. The general legal framework for the resolution of category "D" claims is set out in chapter V of the Panel's First Report.

C. Applicable evidentiary standard

7. The issue of evidentiary standards to be applied in reviewing category "D" claims was addressed by the Panel in chapter VI of the First Report and chapter II of the Second Report. [4] These two reports were approved by the Governing Council in decisions 47 and 49 respectively. [5] As with the first and second instalments, the Panel has reviewed the claims in the present instalment and made its recommendations by assessing the documentary and other appropriate evidence as well as balancing the interests of claimants, who had to flee a war zone, with the interests of the Government of Iraq, which is liable only for damages caused as a direct result of its invasion and occupation of Kuwait.

II. NEW ISSUES ARISING IN APPLICATION CLAIMS

8. As indicated above, some of the application claims in this instalment raise new issues that were not dealt with in either the First or Third reports. These new issues and the Panel's determinations on those issues are set out in this section.

A. D1(money) issues: Claims for departure expenses incurred outside the jurisdictional period

9. The Panel considered claims submitted by individuals who had incurred D1(money) expenses outside the period 2 August 1990 - 2 March 1991 (the "jurisdictional period"). While the claimants had themselves departed during the jurisdictional period, expenses such as furniture transport costs were not incurred until after 2 March 1991. The Panel determined that in order to be considered for compensation, in addition to proper documentary evidence of the expenses claimed, there must be an acceptable explanatory statement [6] as to why the expenses claimed were incurred outside the jurisdictional period and their relation to Iraq's invasion and occupation of Kuwait.

B. D1(MPA) issues

10. A number of D1(MPA) claims are submitted on behalf of minors, ranging from newborns to adolescents, for forced hiding during Iraq's invasion and occupation of Kuwait. The Panel took cognizance of the circumstances of forced hiding by family groups during the jurisdictional period and considered the question of the ability of a child to experience a "manifestly well-founded fear for one's life or of being taken hostage or illegally detained". [7] The Panel determined that children who had learnt to walk and had to be restrained and confined would be capable of experiencing such fear. Accordingly, the Panel considered that a child of two years or older would be considered capable of experiencing a "manifestly well-founded fear" for the purposes of D1(MPA) claims.

C. D2(personal injury) issues

1. Determination of applicable deemed income

11. The Panel considered a personal injury claim where the victim was a non-Kuwaiti injured in Kuwait who took treatment in a third country. The Panel determined that for the purposes of calculating the recommended D2(personal injury) award and assigning a deemed income to the injured person, the deemed income should take into account the location of the injury. Since the injury occurred in Kuwait, the deemed income for Kuwait was used for calculating the recommended award.

2. Concurrent claims for D2(personal injury) and D6(loss of income)

12. The Panel considered whether individuals who had claimed losses under both D2(personal injury) and D6(loss of income) could receive concurrent awards for both loss types. The Panel concluded that although both loss types contemplate loss of income as an element of compensation, concurrent awards would not result in overlapping compensation as the D6 loss relates to the loss of a specific term of employment and the D2 loss relates to the inability of the claimant to continue to earn income due to injury.

3. Claims arising out of multiple sexual assaults

13. The Panel considered the language of decision 8 of the Governing Council in the light of mental pain and anguish claims where consecutive multiple sexual assaults had occurred. Decision 8 establishes a ceiling of US$5,000 "per incident" of sexual assault while a ceiling of US$30,000 per individual is set for all types of MPA claimed. The Panel decided that, in the case of consecutive multiple assaults which occurred on the same occasion, each assault should be viewed as an "incident" within the language of decision 8, having regard to the comparative severity of the mental pain and anguish suffered by a victim of multiple assaults versus a single assault. Accordingly, the Panel determined that the victim would be entitled to US$5,000 for each incident of sexual assault, up to a maximum of US$30,000.

4. Claims for development of abnormalities during pregnancy

14. Claims for pre-natal injuries caused to a child should be considered compensable losses where a direct causal link between the physical condition that caused the injury and Iraq's invasion and occupation of Kuwait can be established. In one claim, the Panel determined that the medical evidence established that pregnancy complications arising from a scud missile attack resulted in foetal stress causing the child to be born with severe brain damage. The Panel has recommended an award of compensation on the basis that the injury to the child was directly caused by military operations of Iraq in the context of Iraq's occupation of Kuwait.

5. Claims concerning congenital conditions

15. The Panel considered a claim by a mother on behalf of her son who was five years old at the time of an Iraqi missile strike near their home. The mother alleges that she noticed a squint in her son's left eye which rapidly deteriorated to complete esotropia (a rotation of the eyeball towards the nose) and loss of vision. The boy underwent two operations in an effort to correct the problem, but without success. Two medical reports were provided, both of which left in considerable doubt the connection between the esotropia and the emotional trauma. One report noted that the mother had a history of esotropia.

16. The Panel found that the claimant had not established a clear causal link between the onset of the esotropia and the scud missile attack. The Panel also took into account the fact that there was a family history of the condition and determined that without a clear link between the onset of the condition and Iraq's invasion and occupation of Kuwait, no compensation could be awarded.

D. D3(death) issues: Claims for missing persons

17. The Panel considered a D3(death) claim for a missing person where the claimant had not provided proof of death. Having regard to the passage of time between the submission of the original claim and the processing of the claim, the Panel was of the view that the claimant should be contacted in order to determine whether there was any further information available concerning the missing person since the submission of the claim or whether the claimant was able to furnish appropriate evidence of death. After having made a request of the claimant for such further evidence and receiving no response, the Panel determined that no compensation could be awarded.

E. D6(loss of income) issues

1. Claims for farm subsidies

18. A number of individuals claim under D6(loss of income) for loss of support in connection with farm operations in Kuwait. The claimants were lessees of land from the Kuwait Department of State Properties and were licensed to exploit the land for agricultural purposes. Before Iraq's invasion, the lessees received government support from the General Authority for Agriculture for their farming activities and they now claim compensation in respect of the government subsidy that they would have received in 1991 and 1992.

19. The Panel considered that, generally, losses suffered by farming operations that were shown to be directly related to Iraq's invasion and occupation of Kuwait could be compensable. However, as the claimants were not engaged in any farming operations during the period claimed for, non-receipt of a subsidy would not constitute a compensable loss to the claimants. The Panel has therefore recommended that no compensation be awarded for failure to receive the subsidy.

2. Claims for loss of income where the claimant was re-employed during the jurisdictional period

20. A number of individuals who had submitted D6(loss of income) claims relating to their employment which was terminated at the time of the invasion were able to secure new employment during the jurisdictional period. The Panel considered a claimant's duty of mitigation in the employment loss context and general principles of damages in determining how to treat income from such new employment in the calculation of compensation. The Panel took cognizance of the Background Report on Employment Claims prepared for the Commission by an international labour expert [10] and concluded that the duty to mitigate the employment loss was already built into the methodology employed by the Commission.

21. The Panel therefore determined that, as a general rule, income from new employment secured after 2 August 1990 will not be deducted from the recommended award calculated under the D6 methodology as it is already accounted for in the methodology. However, the Panel would review on an individual basis any case where the claimant earned substantial income from the new employment.

3. Claims with proof of employment but no evidence of income earned

22. In instances where claimants have provided proof of employment at the time of Iraq's invasion of Kuwait but have been unable to provide documentary evidence of their salary, the Panel determined that the "Table of Average Wages of Paid Employment in the Labour Force" included in the PAAC "C" Covering Report, could be used to calculate compensation based upon statistical information concerning the claimants' type of employment and nationality. [11] The Panel emphasized that both the fact of employment and an employment-related loss would have to be clearly established in order for the claimant to receive compensation using the PAAC monthly income figures.

F. D(other) issues

1. Claims arising from fines imposed by courts in Iraq

23. The Panel considered claims for fines paid by the claimant to a court in Iraq and claims for funds confiscated pursuant to a court order issued by a court in Iraq. The Panel determined that where the fines levied by the court or the court-ordered confiscation of funds were directly related to Iraq's invasion and occupation of Kuwait, the amounts lost would be compensable. The Panel decided that where the amounts lost are evidenced by a court order, the claimant should provide the original or a certified copy of the court order to the Panel for confirmation.

2. Claims arising out of bribes paid

24. A claimant who was visiting Iraq at the time of Iraq's invasion of Kuwait states that he paid bribes to various "guards, drivers, judges and other authority figures" to secure his release after having been taken into custody in Iraq. The Panel considered whether amounts allegedly paid as bribes to secure a person's release from detention in Iraq were directly related to Iraq's invasion and occupation of Kuwait and what would constitute sufficient proof of payment of such bribes.

25. The Panel considered that such claims would have to be reviewed in the light of the circumstances of each case and the evidence provided. The Panel held that in the present case the claimant had failed to provide any acceptable evidence and concluded that no award be recommended.

III. REVIEW OF PREVIOUS PANEL DECISIONS

A. D6(loss of income): End of service indemnities

26. In the Third Report, the Panel noted that some of the non-Kuwaiti public sector employees employed in Kuwait prior to Iraq's invasion and occupation of Kuwait had acknowledged receiving end of service indemnities from their employers. [12] The Panel had taken into consideration the fact that end of service indemnities had already been factored into the D6(loss of income) salary multiplier and determined that, where evidence existed that a claimant had received end of service indemnities, those amounts should be deducted from the recommended amount of compensation.

27. Subsequent to its decision in the Third Report, the Panel received information from the Government of Kuwait concerning the nature and method of calculation of the end of service indemnities. After a review of this information, the Panel has come to the conclusion that such end of service indemnities were in fact in the nature of superannuation, a non-contributory service benefit accrued over time by the employee, and were payable to the employee in any event at the time of termination. The Panel also took note of the fact that the Government of Kuwait did not file a claim with the Commission for the reimbursement of these benefits.

28. In the light of this further information, the Panel determined that such end of service indemnities could not be deducted from the recommended awards calculated under the D6(loss of income) methodology and that, where necessary, amendments should be made to any claims from previous instalments where end of service indemnities had been deducted from the recommended awards. Such corrections will be recommended in reports on subsequent instalments.

IV. PANEL DETERMINATIONS ON OTHER CLAIMS IN THE THIRD INSTALMENT

29. In the course of reviewing and checking the application of the methodologies to the claims in the third instalment, the Panel made a number of additional determinations.

30. The D2(personal injury) claims reviewed by the Panel included claims for injuries which had occurred outside the jurisdictional period. The Panel affirmed that in order for such injuries to be compensable, the claimant had to demonstrate a clear and direct connection between the injury and Iraq's invasion and occupation of Kuwait. In one claim, the Panel determined that since the claim of a child born with severe brain injuries had been recommended for compensation (referred to at paragraph 14, supra), the father's claim should be rejected as it duplicated the same loss. In another case, the Panel held that where a claimant failed to tick the D2(MPA) box on the claim form, but clearly demonstrated MPA in the attached statement, the claimant could receive compensation for MPA.

31. The Panel noted that a small number of claims with D4(personal property) losses had been inadvertently included in the third instalment. The Panel held that since the D4(personal property) methodology had been developed and approved by the Commission's Governing Council before the completion of the third instalment, it was able to make recommendations for these claims.

32. In both the First and Third Reports, the Panel considered the compensability of D6(loss of income) claims by the employees of the London branch of an Iraqi state owned bank which closed down shortly after Iraq's invasion of Kuwait. The Panel concluded then that such claims would be compensable regardless of the location of the loss if the loss was shown to be directly related to Iraq's invasion and occupation of Kuwait. In this instalment, one such bank employee was not compensated for the claimed loss of income because the Panel determined that the termination of the claimant's employment in July 1993 was no longer directly related to the invasion and occupation due to the time that had elapsed since the invasion and occupation.

33. The Panel considered a claim submitted under D6(loss of income) in relation to an individual's subcontracts for services. The trigger for payment under the subcontracts was the invoicing of the work by the contractor or delivery of the completed works according to the project schedule. The Panel held that because the projects that were the subject of the contracts did not go forward or were cancelled, the trigger for payment under the subcontracts did not occur and therefore no compensation was recommended.

34. A number of individuals filed claims under D6(loss of income) which are more properly categorized as D8/9(business loss) claims. The Panel determined that such claims could not reasonably be processed under the existing methodologies, and therefore directed that the claims be deferred for consideration with individual business loss claims.

35. The Panel reviewed a number of claims in which individuals claimed for judgment debts that pre-dated Iraq's invasion and occupation of Kuwait. The Panel determined that where the judgment debtor continues to exist, or where the claimant has failed to make sustained attempts to collect on the judgment debt, the claims are not compensable. The Panel determined that to be eligible for consideration, the claimant must establish that the disappearance or insolvency of the judgement debtor is directly related to the invasion and occupation.

V. RECOMMENDATIONS

A. Awards by submitting entity

36. The annex hereto lists the awards recommended by the Panel for each Government and international organization that has claimants included in the third instalment. Each Government and international organization will be provided with a confidential list containing the individual recommendations made in respect of its claimants. As will be seen from the annex, against the total amount claimed of US$102,987,603.71, the Panel has recommended compensation totalling US$19,502,642.64.

B. Interest and exchange rates

37. The Panel recommends that interest be awarded pursuant to its determinations as set out in chapter V, section H of the First Report.

38. For purposes of calculating recommended amounts, the Panel has converted currencies other than United States dollars pursuant to its determinations set out in chapter V, section G of the First Report.

39. Where losses are claimed for money in currencies other than United States dollars and it is established from the evidence in the claim file that the application of the exchange rate approved by the Panel mentioned above, would result in either under-compensation or over-compensation of the claimant, the Panel determined that it will select a conversion rate based on the evidence that most closely compensates the claimant for the value of the loss suffered. This would be applied in situations, in particular, where the claimant has submitted evidence that he or she purchased the money at a rate different to the rate approved by the Panel.

C. Submission through the Executive Secretary to the Governing Council

40. The Panel respectfully submits this report through the Executive Secretary to the Governing Council, pursuant to article 38(e) of the Rules.

Geneva, 26 January 1999

(Signed) R.K.P. Shankardass
Chairman

(Signed) H.M. Joko-Smart
Commissioner

(Signed) M. C. Pryles
Commissioner

Notes

1/ S/AC.26/1992/10.

2/ In the first instalment of category "D" claims, the Panel developed methodologies for the following loss types: D1(money); D1(mental pain and anguish ("MPA"); D3(death); D4(motor vehicles); D6(loss of income); D10(payment or relief to others); and D10(other). A full description of the methodologies is set out at paragraphs 103 to 382 of the "Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)" (S/AC.26/1998/1)("First Report"). The Panel developed methodologies for the following loss types in part one of the second instalment: D2(personal injury) and D5(loss of bank accounts, stocks and other securities). These methodologies are described in the "Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Second Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)" ("Third Report"), at paragraphs 41-116.

3/ See in particular chapter II of the First Report and chapter IV of the "Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the First Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)" (S/AC.26/1998/3) ("Second Report").

4/ See also paragraph 8 of Goverring Council decision 7 which provides that "[s]ince ... [D] claims may be for substantial amounts, they must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss" (S/AC.26/1991/7/Rev.1). See also articles 35(2) and (3) of the Rules.

5/ S/AC.26/Dec.47 (1998) and S/AC.26/Dec.49 (1998).

6/ See paragraph 75 of the First Report for the Panel's elaboration on an "acceptable explanatory statement".

7/ See paragraph 3(f) of Governing Council Decision 3 (S/AC.26/1991/3).

8/ See paragraph 70 of the Third Report for an explanation of how the "deemed income" is determined. The deemed annual income for Kuwait was established by the Panel as being KWD 6000 pursuant to the "Table of Average Wages of Paid Employment in the Labour Force" which is part of a report entitled "Ministry of Planning Final Results Labour Force Survey, March 1988 (Part I)", contained in the "Covering Report and Supporting Materials for Claims in Category C Submitted to the United Nations Compensation Commission by the Public Authority for Assessment of Compensation for Damages Resulting from Iraqi Aggression, Government of the State of Kuwait, 14 April 1994" ("PAAC 'C' Covering Report").

9/ S/AC.26/1992/8

10/ "Background Report on Employment Claims (C6)" prepared for the Commission by Alan Gladstone, December 1993.

11/ See note 8.

12/ See the Third Report at paragraphs 32 and 33.

Annex

Summary Recommendations of the Third Instalment of Category "D" Claims

Submitting Entity	Amount Claimed (US$)	Number of Claims Recommended	Number of claims Not Recommended for Payment	Amount of Compensation (US$)
Australia	736,769.70	2	1	167,664.83
Canada	3,503,652.98	16	4	562,930.19
Egypt	450,160.77	--	1	0.00
France	131,150.00	--	1	0.00
Germany	42,547.71	1	0	22,837.40
Hungary	38,266.00	1	--	38,266.00
Iceland	146,186.85	1	--	9,055.73
Ireland	3,730.00	--	1	0.00
India	27,301,610.73	40	8	1,501,591.52
Israel	18,963,200.00	7	--	236,713.64
Italy	224,803.00	2	3	51,712.79
Jordan	26,671,914.05	97	9 1/	5,145,257.40
Kuwait	5,667,709.81	90	15 2/	5,664,171.70
Lebanon	373,002.32	2	1	119,148.33
Philippines	106,342.82	1	--	48,957.18
Pakistan	71,169.55	1	--	35,584.80
Sudan	1,075,812.83	7	--	377,168.50
Sweden	94,735.00	1	--	94,735.00
Syria	194,989.00	--	1	0.00
United Kingdom	10,149,981.48	54	9 3/	3,132,729.79
United States	6,296,172.94	50	6	2,161,993.73
UNDP (Washington)	263,927.78	1	3	7,958.00
UNRWA (Gaza)	271,589.29	3	0	124,166.11
Total	102,779,424.61	377	63	19,502,642.64

1/ One claim from Jordan has been deferred.

2/ Six claims from Kuwait were deferred.

3/ One claim from the United Kingdom has been deferred.